

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

USA,

Plaintiff,

V.

KENNY TORRES-COLON

Defendant.

Crim. No. 12-286 (GAG)

MEMORANDUM OPINION AND ORDER

On April 12, 2012, Defendant Kenny Torres-Colon (“Torres”) was indicted for being a convicted felon in possession of a firearm and ammunition. (See Docket No. 16.) As described by the government, Torres was a passenger in a speeding vehicle and was observed throwing a firearm and fanny pack out the window onto the highway. (See Docket No. 83 at 2.) After collecting the evidence, consisting of the firearm, seventy-two rounds of ammunition and five magazines, it was sent to the Institute of Forensic Sciences of Puerto Rico (the “Institute”) for ballistic testing. (See id. at 3.) The evidence was not subjected to fingerprint testing. (See id.) The items were eventually transferred to Torres’ expert for fingerprint testing. (See id.) In anticipation of the results from Torres’ expert, the government moved to exclude any evidence regarding the fingerprint analysis. (Docket No. 83.) Torres’ opposed and motioned for dismissal of the indictment. (Docket No. 89.) After reviewing the parties’ submissions and the pertinent law, the court **DENIES** the government’s motion to exclude (Docket No. 83) and **DENIES** the Torres’ motion to dismiss (Docket No. 89).

J. Standard of Review

Rule 402 of the Federal Rules of Evidence states, “[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution, a federal statute, these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.” FED. R. EVID. 402. The test for relevant evidence is, “(a) it has any tendency to make a fact more or less

Crim. No. 12-286 (GAG)

1 probable than it would be without the evidence; and (b) the fact is of consequence in determining
 2 the action.” FED. R. EVID. 401. Relevant evidence may be inadmissible because its probative value
 3 is outweighed by its unfair prejudicial value, confuses the issues or misleads the jury. See FED. R.
 4 EVID. 403. In conducting a Rule 403 analysis the court only seeks to avoid unfair prejudice, because
 5 all evidence is designed to be prejudicial in some capacity. See *U.S. v. Varoudakis*, 233 F.3d 113,
 6 122 (1st Cir. 2000).

II. Discussion**A. Motion to Exclude at Docket No. 83**

9 The government seeks to exclude Torres’ fingerprint report because it would confuse the
 10 jury. (See Docket No. 83 at 5 (“This will only cause confusion to the potential members of the jury
 11 and should be excluded as allowed under Fed. Rules Evid. 403 . . .”.) The court disagrees. The
 12 results are relevant and will not confuse the jury. The lack of fingerprints on the firearm and
 13 ammunition are relevant to whether Torres possessed those items. The fact that no fingerprints were
 14 recovered from the items will not confuse the jury. In fact, it will be important evidence for the jury
 15 to consider when deciding whether Torres committed the crime of possessing these items. The
 16 government argues that the lack of fingerprints is completely expected and normal, while at the same
 17 time argues that such evidence is confusing. The government will be given the opportunity to
 18 explain to the jury why no fingerprints were found and how latent fingerprints are rarely found on
 19 firearms and ammunition during trial. But the proposition that no fingerprints were found is not
 20 confusing. Juries are entrusted to grasp fingerprint analysis and weigh the evidence, even in more
 21 complicated cases. See e.g., *U.S. v. Hernandez-De La Rosa*, 606 F. Supp. 2d 175, 187 (D.P.R.
 22 2009). Therefore, the court **DENIES** USA’s motion to exclude evidence regarding Torres’ expert’s
 23 fingerprint analysis.

B. Motion to Dismiss the Indictment at Docket No. 89

25 Torres’ motion to dismiss the indictment raises some serious concerns for the court.
 26 Ultimately, Torres does not have the right to require the government to perform fingerprint analysis
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Crim. No. 12-286 (GAG)

1 on evidence. Courts have held a defendant has a constitutional right to have an expert examine
2 evidence for fingerprints when the government intends to demonstrate the defendant's identity
3 through fingerprint analysis. See U.S. v. Thomas, 216 F.3d 1089, T. at *2 (10th Cir. 2000) ("A
4 appellant's constitutional right to a fingerprint expert thus only arises upon a threshold showing that
5 proof of the perpetrator's identity through fingerprint evidence is likely to be a significant factor at
6 trial."). That is not the case here as the government admits there are no fingerprints on the evidence.
7 Torres had the right to have its own expert examine the evidence for fingerprints, which was allowed
8 and the tests were performed. The lack of fingerprints is an issue Torres may use when defending
9 the issue of possession.

10 As argued by the government, there was a need to collect this evidence from the roadside.
11 Certainly, no responsible police officer could allow a handgun and dozens of rounds of ammunition
12 be left unattended along the highway. But it seems the officers took no precautions to preserve the
13 evidence. The government does not even attempt to explain the surrounding circumstances that
14 forced the officers to retrieve the evidence with their bare hands.

15 Torres seeks dismissal of the entire case due to the improper handling of the evidence. (See
16 Docket No. 89.) Due to the lack of fingerprints, the government will have to rely on other evidence
17 to prove possession, such as eye-witness accounts of the events. That evidence is not tainted by the
18 handling of the evidence. Torres has the right to impeach any testimony with questions regarding
19 the proper handling of evidence and can rely on the lack of fingerprints to support its arguments.
20 It will be up to the jury to hear all the testimony and make credibility determinations. The court shall
21 not exclude the evidence or dismiss the case.

22 II. Conclusion

23 For the foregoing reasons, the court **DENIES** the government's motion to exclude fingerprint
24 testimony (Docket No. 83) and **DENIES** Torres' motion to dismiss the indictment (Docket No. 89).

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Crim. No. 12-286 (GAG)

SO ORDERED.

In San Juan, Puerto Rico this 12th day of August, 2013.

s/ *Gustavo A. Gelpí*

GUSTAVO A. GELPI

United States District Judge